In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1246

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., AND DATA SYSTEMS, INC., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, AND AMERICAN NATIONAL BANK AND TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY

The respondent Comptroller of the Currency does not oppose the granting of certiorari limited to the following question:

> Whether, in applying the principle that standing to complain that a competitor's activities are prohibited exists only if the plaintiff is a member of a class intended to be protected by the statute allegedly violated, standing may be rested solely on a subsidiary policy behind a *different* statute plainly inapplicable to the defendant competitor.

The foregoing question is identical to that presented by the Comptroller's petition for a writ of cer-

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tiorari in *Camp* v. *The Wingate Corporation*, which is being filed contemporaneously herewith to seek review of a decision of the Court of Appeals for the First Circuit that is in explicit conflict with the decision below.[1]

STATEMENT

This is an action for declaratory and injunctive relief against the Comptroller of the Currency and the American National Bank and Trust Company. Petitioners, an association of data processing service companies and a member of the association, seek to invalidate a ruling by the Comptroller under 12 U.S.C. 24 Seventh, that, incidental to their banking services, national banks may make data processing services available to other banks or bank customers.

The district court dismissed the action for lack of standing (Pet. App. 13–22), and the Court of Appeals for the Eighth Circuit affirmed (Pet. App. 23–33). After an exhaustive analysis of the decisions of

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[1] The Comptroller's petition and the petition that has been filed in *Industrial National Bank of Rhode Island* v. *The Wingate Corp.*, No. 1408, O.T., 1968, both seek review of the First Circuit's decision in *The Wingate Corporation* v. *Industrial National Bank* (No. 7186, decided March 27, 1969). The same opinion also decided another case, *Arnold Tours, Inc.* v. *Camp* (No. 7192), in favor of the Comptroller's position, and a petition for a writ of certiorari has been filed by the plaintiffs, *Arnold Tours Inc., et al.* v. *Camp, et al.*, No. 1407, O.T., 1968. The Comptroller is contemporaneously herewith filing a brief in opposition to that petition, which raises the question of the standing of a national bank's competitor to challenge the bank's activities as *ultra vires* in the absence of any statutory protective purpose whatever. The First Circuit's opinion is set forth at Pet. App. 36–46.

this Court and of the various courts of appeals, the court below concluded that a competitor may challenge allegedly "illegal" competition only when he can show (1) that he has a legal right to be free from competition by reason of a governmental charter; (2) that specific legislation authorizes him as an "aggrieved person" to sue in the public interest; or (3) that he is a member of a class given express statutory protection against the competition. Since none of these situations was found to be present here, the court held that petitioners lack standing to attack the bank's activities as beyond the scope of the powers given national banks in the National Bank Act, 12 U.S.C. 24 Seventh. Petitioner's reliance upon a claimed protective purpose in the Bank Service Corporation Act of 1962, 12 U.S.C. 1861–1865, was held to have been "misplaced," since that Act was not alleged to have been violated (Pet. App. 32, n. 12).

DISCUSSION

1. As we have noted, the subsequent decision of the Court of Appeals for the First Circuit in *The Wingate Corporation* v. *Industrial National Bank,* which is the subject of our petition for a writ of certiorari being filed contemporaneously herewith, is in explicit conflict with the decision below. The *Wingate* case involved an identical attack by a data processing service company against the same ruling by the Comptroller and similiar activities by a national bank pursuant to the ruling. The First Circuit agreed with the court below on the general principle that the plaintiff would have standing only if it was the beneficiary

of a statutory purpose to protect it against competition (Pet. App. 38–44). It went on to hold, however, that one section of the Bank Service Corporation Act of 1962 had apparently been enacted to protect the plaintiff's class from competition by bank service companies. While no such company was involved in the case, the First Circuit considered that the Act also "arguably prohibits direct entry by national banks into the data processing service business" (Pet. App. 46), thus providing a sufficient indication of protection against competition to grant standing to the plaintiff to attack the allegedly unlawful ruling of the Comptroller. The First Circuit explicitly recognized that this conclusion conflicted with the decision in the instant case (Pet. App. 45 n.8).

We believe that the decision below was correct. Nevertheless, because of this conflict and because of the importance of the question (as shown in our petition in *Wingate*), it would be appropriate for the Court to grant certiorari in this case as well as in *Wingate*.

2. The petition in this case—while stating the question presented in terms of the *factual* situation involved—raises in its argument section broader issues than are raised in our *Wingate* petition. We submit that these broader issues need not be considered and that the grant of certiorari should be limited to the question as we have framed it above and in the *Wingate* petition.

After pointing out the conflict with the First Circuit's decision in *Wingate* (Pet. 4–5) petitioners go on to urge as an additional reason for granting certiorari

that the general principles followed below (and in *Wingate*) are inconsistent with an alternative holding by the Court of Appeals for the Fifth Circuit in *Saxon* v. *Georgia Ass'n of Independent Insurance Agents*, 399 F. 2d 1010. In that case the Fifth Circuit found a statutory purpose to protect the plaintiffs, but further commented that the plaintiffs would also have had standing simply as competitors complaining that the bank's activities were unlawful. Petitioners contend that the Court should therefore decide in this case that standing is established whenever a plaintiff is adversely affected *in fact* by activities that he contends are unlawful; in support of this position they further suggest that the Administrative Procedure Act's judicial review position, 5 U.S.C. (Supp. III) 702, has generally expanded the class of potential plaintiffs.[2] Pet. 5–10.

These broader questions are also raised in the pending petition for a writ of certiorari in *Arnold Tours, Inc., et al.* v. *Camp, et al.*, No. 1407, O.T., 1968.[3] As we show in the Comptroller's opposition to that petition and in the Comptroller's petition in *Wingate*, there is no reason for the Court to reconsider the established basic principle, reiterated as recently as last year in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, that competition without more is insufficient to establish standing. Both the decision below and the

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[2] Petitioners admit (Pet. 10) that they did not raise the Administrative Procedure Act point below.

[3] See note 1, *supra*.

conflicting decision in *Wingate* are based upon that established principle, and they differ only as to the nature of the statutory protection that will suffice to support standing. And despite the broader alternative language in the Fifth Circuit's decision in the *Insurance Agents* case, that decision does not depend on anything more than the court's determination that the requisite statutory protection was present.

CONCLUSION

For the foregoing reasons, the Comptroller of the Currency does not oppose the grant of a writ of certiorari limited to the question stated at the beginning of this memorandum, but does oppose further consideration of the broader questions suggested in the petition.

Respectfully submitted.

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